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Recent Changes in the Scope of Judicial Control Over Administrative Methods of Decisionmaking

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NOTES

RECENT CHANGES IN THE SCOPE OF JUDICIAL CONTROL OVER ADMINISTRATIVE METHODS OF DECISIONMAKING

A series of recent cases of the United States Courts of Appeals evince an increasing judicial willingness to overturn decisions of administrative agencies on grounds seemingly unrelated to the substantive merits of the particular decision in question. The emphasis instead has been on altering, in certain situations, the methods by which the agencies make decisions.

The federal courts have traditionally overseen the decisions of administrative agencies. However, the usual role has been for courts to intervene only infrequently, and even then only for the purpose of reversing administrative determinations on their merits under the guise of settling questions of law.[1] Recently, however, the courts, in the absence of statutory guidance, have been increasingly willing to assume a supervisory role over the process, as opposed to the product, of administrative decisionmaking.[2] As a key component of this supervision, the courts

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1. For example, the Administrative Procedure Act § 10(e) provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

5 U.S.C. § 706 (1970). Consequently, a reviewing court will, in an appropriate case, label as a "question of law" the proper relationship between various factors that the agency must consider in performing its appointed task. The court will then determine that the law which the agency must thereafter accept as given is a certain fixed relationship among these factors. This approach is illustrated by Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). By statute, the Secretary of Transportation was prohibited from authorizing the expenditure of federal funds to finance highway construction through public parks if a "feasible and prudent" alternative route existed. 49 U.S.C. § 1653 (f) (1970); 23 *id.* § 138. Finding "law to apply" by looking "primarily to the statutes themselves" rather than an "ambiguous" legislative history, 401 U.S. at 412 n.29, the court rejected the agency's argument that a balancing of the various factors in determining what was "prudent and feasible" was to be left to the agency's discretion. Rather, public parks were to be preserved "unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes." *Id.* at 413.

The traditional test for determining when a court should step in and label a given determination a question of law to be decided by the court has been described by Professor Jaffe as one hinging on "clear statutory purpose":

> [W]here the *judges* are themselves *convinced* that certain reading, or application, of the statute is the *correct*—and only *faithful*—reading or application, they should intervene and so declare. Where the result of their study leaves them without a definite preference, they can and often should abstain if the agency's preference is "reasonable."

L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 572 (1965) (emphasis in original) [hereinafter cited as JAFFE].

2. This is possible because the administrative process, while growing larger in its proportion to the totality of government in the recent past, seems never to have received

are insisting upon a shift in the power relationship among the parties involved in the administrative process.[3]

This note will discuss: the judicial techniques for imposing changes in the agency's decisionmaking methodology; the effect of these changes upon the functioning of the administrative agency as a decisionmaking institution; and the probability that these developments will significantly change the overall substantive results of the administrative process.

JUDICIAL INSISTENCE ON SUBSTANTIVE STANDARDS FOR DECISION

One of the recently imposed court requirements is that, in appropriate cases, administrative determinations should be predicated on relatively permanent decision criteria,[4] or standards, developed by the agency for general application. This requirement demands that administrative procedures provide for the formulation of a general policy[5] as

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a firmly grounded constitutional sanction, nor a well developed theoretical base vis-a-vis the traditional three branches of government. *See* J. LANDIS, THE ADMINISTRATIVE PROCESS 2 (1938). *See also* note 113 *infra.*

3. The potential parties involved in the administrative decision can be categorized as follows:

(a) The judiciary.

(b) The administrative agency or institution with all its multifarious divisions, branches and interest groups.

(c) The "primary" public group or groups involved—that group or those groups with reference to whose behavior the administrative process of the involved agency was instituted to affect (to promote, control, structure, etc.). "Group" itself is a term of degree. Generally, a set of individuals or organizations can be called a group to the extent that their individual objectives are predominately affected in the same direction (positive/negative) by the administrative decision at issue. Thus, it is clearly possible to have more than one primary group involved in a given administrative decision (*e.g.,* the railroad and trucking industries in an ICC determination of railroad freight rates). It is also possible to have no primary group distinguishable from the public generally with respect to a given administrative determination. This is especially true with "line" as opposed to "regulator" agencies. *See* M. SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 5-9 (1968).

(d) The "secondary" public group or groups involved in the specific case. Such groups generally become involved in the formal administrative decision process at their own initiative. This is so even though the administrative process was not instituted to affect them per se, except to the extent that the collective legislative judgment may have had their specific interests in mind when legislating in the "public interest." Nevertheless, they feel that their interests will as a practical matter be so significantly affected by the administrative decision that it is worth their while on some subjective cost/benefit calculus to participate in the formal process.

4. The term "decision criteria" is from Grundstein, *Administrative Law and the Behavioral and Management Sciences,* 17 J. LEGAL ED. 121 (1964) [hereinafter cited as Grundstein]. Involved here is the agency doing for itself what the courts have traditionally done under the guise of settling questions of law. *See* note 1 *supra.*

5. Usually, over some range of decision options, value elements which are relevant to the decision in question conflict; one value is achievable to a greater degree only at the expense of others. Consequently, these values must be structured in terms of priority into a goal set or social preference function.

a prerequisite to decisions which necessarily involve significant conflicts among important social values. The correctness of a particular policy is not the issue.

Within limits, the administrative agency is free to develop a preferential relationship among competing values.[6] However, there is an increasing tendency for the courts to insist that *some* policy determination be made, be publicly known, and be followed reasonably consistently by the agency. The concern is not so much what the "law" is as that some law is properly developed.

Recent decisions illustrate two alternative judicial methods for achieving this result. One of these judicial techniques is to insist that the agency, prior to resolving the particular issue before it, develop decision standards applicable to all analogous situations. After standards have been developed, the agency may decide the case at hand, but the result must rest upon the general standards.

This method was utilized in *Environmental Defense Fund, Inc. v. Ruckelshaus.*[7] In that case, the administrator had refused a request of an environmental interest group to issue a cancellation and summary suspension order for the registration of DDT under the Federal Insect-

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Such values are ultimately ranked not only as a result of their intrinsic desirability, but also because most ends or goals at least partly affect more final ends which must be considered. *See* H. SIMON, D. SMITHBURG, & V. THOMPSON, PUBLIC ADMINISTRATION 58-59 (1950). Thus, the value elements that conflict will to the extent feasible be structured in a way that tends to achieve a perceived "higher" objective. *But see* note 78 *infra.*

Policy development is then a determination of a preferential relationship among a set of conflicting values stated in terms of behavioral objectives. *See, e.g.,* note 25 *infra* where the desired value of general public input into public broadcasting translates into the behavioral objective of providing for reimbursement of secondary group intervenors in license renewal proceedings. The question becomes to what extent shall the behavior unit (in this context, the agency) pursue value A, thus cutting against value B, or conversely, what is the minimum extent to which value B must be served, thus setting limits on the potential achievement of A? Doubtless in many specific instances this is done in qualitative rather than quantitative terms. In Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), the value premise of cost minimization was to be served to the extent that costs of "extraordinary magnitudes" were not to be incurred, thus setting limits on the achievement of the "preservation of parkland" value. Thus, at some fixed point costs will be deemed to be "extraordinary" and the conflicting value no longer to be pursued, rather than having a sliding scale function where an acceptable level of cost will be at least partially a function of the amount of the other value (preservation of parkland) expected to be achieved. The "qualitativeness" of much policy development seems more a function of the relative crudeness of our technology, both in scaling values and in measuring the cause and effect relationship between them, than of any intrinsically different logic.

6. The "law"—the standard to govern administrative decisions—reflects both the agreed upon social hierarchy of values and a strategy for achieving or pursuing such values in a factual setting.

7. 439 F.2d 584 (D.C. Cir. 1971).

icide, Fungicide and Rodenticide Act.[8] By the terms of the statute, the Secretary may begin a procedure to cancel the registration of a poison when it appears that the poison does not comply with the required statutory standards.[9] In addition, FIFRA provides that the Secretary may suspend the registration of a poison pending the outcome of the cancellation process when it appears that a suspension is "necessary to prevent an imminent hazard to the public."[10]

The *Ruckelshaus* court characterized the suspension question as involving "both factual determination and the application of a legal standard."[11] The factual question required a determination of the extent and probability of harm occuring in the interim between the issuance of the cancellation notice and the conclusion of administrative proceedings. Legal standards must then be applied to evaluate these factual determinations. The court held that the statute "entrusted to the Secretary in the first instance" the task of formulating standards for suspension.[12] In establishing these standards, the agency must ascertain the risks from which Congress intended the public be protected. It was the court's task, however, to ensure that appropriate standards were in fact developed and were used in deciding individual cases. The Secretary

> has an obligation to articulate the criteria he devolops in making each individual decision. We cannot assume, in the absence of adequate explanation, that proper standards are implicit in every exercise of administrative discretion.[13]

This decision was then remanded to the Secretary with instructions to

> consider whether the information presently available to him calls for suspension of any registrations of products containing DDT, identifying the factors relevant to that determination, and relating the evidence to those factors in a statement of the reasons for his decision.[14]

Clearly then, the court in *Ruckleshaus* was mandating the develop-

8. 7 U.S.C. §§ 135-135k (1970) [hereinafter referred to as FIFRA].

9. The procedure begins by the Administrator (formerly the Secretary) issuing a "notice of cancellation" which then results in a set of investigations and hearings required for a final determination of the legal status of the poison—whether it is suitable for registration. *Id.* § 135b(c).

10. *Id.*

11. 439 F.2d at 595.

12. *Id.* at 596.

13. *Id.*

14. *Id.* The court added that "[i]t may well be, however, that standards for suspension can best be developed piecemeal, as the Secretary evaluates the hazards presented by particular products." *Id.*

ment of substantive decision standards by the administrative agency. The court held that the agency must enumerate the relevant factors—*i.e.*, the competing values which will be enhanced and discounted in the decision.[15] It must then arrange these factors in a patterned relationship to provide a guide for decisions in specific factual situations.[16] Within limits, the administrator is free to lay down any boundary criterion that will subsequently discriminate between "satisfactory" and "unsatisfactory" choice areas,[17] but he must do so before deciding a specific case.

A second judicial method of requiring administrative decision standards is illustrated by *Office of Communication of United Church of Christ v. FCC*.[18] There, the reviewing court essentially employed a stare decisis approach in its reversal of the administrative decision, and required the agency to follow its own "past precedent."

Petitioner was a public interest organization which had provided technical and legal assistance to several community groups seeking to persuade the Federal Communications Commission to deny the license renewal request of an allegedly racially biased local television station. While the issue was pending before the FCC, petitioners, the community groups and the station came to an agreement whereby the station promised

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15. *Id.* This list of relevant factors will itself be judicially reviewable under the "abuse of discretion" standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1970). Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). *See also* note 102 *infra* (discussion of judicial interpretation of "abuse of discretion").

16. What is called for may be something along these lines: We will pursue value A (*e.g.*, the economic benefits deriving from allowing the poison to be used), even though it cuts against value B (*e.g.*, expected negative public health effects) so long as condition C (*e.g.*, a "substantial" economic reliance on the poison—perhaps required to be defined in quantitative terms) is met, and so long as condition D (*e.g.*, no substantial evidence—again perhaps defined in quantitive terms—that the poison is carcinogenic at normal levels of exposure) is not met.

17. Setting a decision criterion or standard with respect to any given value is equivalent to setting a requirement with reference to that value which must be met for the overall agency decision to be acceptable or satisfactory. Thus, the process of setting decision standards with respect to the various values involved is in fact the process of setting agency goals. This becomes particularly evident when one considers that achieving goals ultimately entails eliminating or avoiding that set of conditions which we do not desire. By setting decision standards, and thus "requirements," the agency defines those outcomes it will deem socially undesirable and eliminates the possibility of such outcomes resulting from its decisions. The foreclosure of these conditions thus becomes the "goal."

> It is doubtful whether decisions are generally directed toward achieving *a* goal. It is easier, and clearer, to veiw decisions as being concerned with discovering courses of action that satisfy a whole set of constraints. It is this set, and not any one of its members, that is most accurately viewed as the goal of the action.

Simon, *On the Concept of Organizational Goal*, 9 AD. SCI. Q. 1, 20 (1964) (emphasis in original).

18. 465 F.2d 519 (D.C. Cir. 1972).

that it would meet the programming needs of minority groups, and the local groups agreed to withdraw their petition to deny renewal. A provision of this agreement stated that the station would reimburse petitioner church for its expenses incurred on behalf of the local organizations. However, when the request for approval of the reimbursement came before the FCC, it was denied, and the agency announced a general policy against reimbursement of intervenors who seek to block license renewals when reimbursement is a condition of settlement with the station. The court held that the FCC's determination and policy announcement in this case could not be sustained.[19] The court justified its decision by citing: (1) the "spirit" of the relevant statute as determined by past Commission decisions; (2) the Commission's past precedent expanding the allowability of reimbursement; and (3) other Commission precedent generally favorable to "public interest" intervention.[20]

This judicial opinion seems indistinguishable from the general approach employed by an appellate court when it reverses a lower court determination on a point of hitherto undecided law. Citing precedent and arguing by analogy, the court held that the agency was bound to give determinative weight to its own earlier decisions and declarations of policy concerning competing values.

It has long been clear that stare decisis has a role to play in the process of administrative decision and judicial review.[21] The usual occasion for invoking its authority, however, has been when an individual's rights would be prejudiced by the agency's deviation from past policy, and even then, the case is usually remanded to the agency to give it the opportunity to articulate a reasoned explanation for its failure to apply past precedent.[22] In *United Church of Christ,* however, the agency was compelled to adhere to its past precedent, and was given no opportunity to articulate reasons justifying its change in policy. This was done in the name of public interest values involved in the agency decision.[23]

This particular judicial technique will of course not always be appropriate. There is impressive judicial precedent holding that "administrative authorities must be permitted, consistent with the obligation of due process, to adapt their rules and policies to the demands of changing

19. The court held that once the Commission had determined that the public interest group seeking to withdraw was bona fide, and that the terms of settlement with the local broadcaster serve the public interest, then voluntary reimbursement of legitimate expenses of the groups could not be forbidden. *Id.* at 527.

20. *See id.* at 524-28 & nn.21-39.

21. *See* Kramer, *The Place and Function of Judicial Review in the Administrative Process,* 28 FORD. L. REV. 1, 70-71 (1959) [hereinafter cited as Kramer].

22. *See, e.g.,* FTC v. Crowther, 430 F.2d 510 (D.C. Cir. 1970).

23. *See* 465 F.2d at 524-28 & nn.21-39.

circumstances."[24] Even in such cases, however, the agency must be able to articulate in a reasoned manner why a change in the policy will better serve an appropriate higher value.[25]

It is apparent that judicial insistence that an agency give more weight to its own precedent achieves the same general result as insistence upon the development of a priori administrative standards. With either approach, the result is that a generalized policy determination is made, is publicly known, and is followed more or less consistently by the agency.

JUDICIAL INSISTENCE ON PROCEDURAL STANDARDS

As an alternative to mandating the development of substantive decision criteria, courts are also beginning to impose a less restrictive decision-making methodology which centers around two major procedural variables: (1) hearing requirements, and (2) record development requirements.[26]

Hearing Requirements

Federal courts are increasingly willing to overturn administrative decisions on the grounds that more stringent hearing requirements should have been applied during the agency's determination of issues involving important social values. These requirements have generally been imposed on the theory that they will force an agency to consider the effects of its decision on the values raised by secondary interest groups. Even though substantive standards for reaching decisions are not necessary, a hearing requirement confines administrative discretion since the agency must, in the factual context of a specific case, formally consider the values raised at a hearing in terms of their relative priority.

Where an agency's statutory mandate requires administrative deter-

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24. Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968).

25. It must be seen that a given decision usually involves both interpreting facts and structuring values to achieve an end that is usually best termed a subgoal or an end that will serve as a means to a higher end. *See* note 5 *supra*. Reimbursement of expenses in FCC litigation, in appropriate cases, is an end which structures several value premises in the context of the particular case. But it is also obviously aimed at a higher or more ultimate end—it is thought to be the most appropriate means to achieving a higher goal (secondary group input into station operating behavior) which itself may become a means at another level of analysis.

26. Another important component of this evolving judicial approach is the relaxed requirements for standing and intervention, favoring "public interest" participants. The evolution of standing has been sufficiently chronicled elsewhere. Baude, *Sierra Club v. Morton: Standing Trees in a Thicket of Justiciability*, 48 IND. L.J. 197 (1973). Sierra Club v. Morton, 405 U.S. 727 (1972), is the latest, if somewhat cryptic, Supreme Court treatment of the subject. Citations to most of the major commentary in the field are found therein. On intervention see generally Comment, *Public Participation in Federal Administrative Proceedings*, 120 U. PA. L. REV. 702 (1972) [hereinafter cited as Comment].

minations to be "on the record after opportunity for an agency hearing,"[27] the Administrative Procedure Act[28] directs that a trial-type hearing be held.[29] In other situations not covered by the APA, less formal public hearings may be required by the specific statute establishing the agency, or by administrative regulations.[30]

Where a formal, trial-type hearing is required by the APA, there may be a question of whether every element of the decision must be determined in the context of such a hearing. Recent cases have indicated that in marginal situations when "public interest" values are concerned, a hearing will be required.

One such case is *Moss v. CAB*.[31] There, a series of ex parte meetings were held between members of the Board and representatives of the airline industry concerning proposed increases in domestic passenger fares. As a direct result of these meetings, the Board issued a detailed outline of the rate structure it proposed to accept. Thereafter, the airlines filed for increases based on the Board's proposed formula. When these fares were allowed to stand, the petitioners, some 32 Congressmen, charged that the Board had effectively "determined" rates without satisfying the statutory procedural requirement of holding public hearings[32] and without taking into account the rate-making factors enumerated in the statute. The Board in defense argued that simply announcing the structure it proposed to accept was not a determination of rates within the meaning of the statute. The court rejected this argument as well as an alternative one that volatile economic conditions in the airline industry justified this expedited and informal procedure.[33] The court characterized the basic

27. 5 U.S.C. § 553 (1970) ("rule making" proceedings); *id.* § 554 ("adjudication" proceedings).

28. *Id.* §§ 500-59, 701-06, 3105, 3344, 5362, 7521 [hereinafter referred to as APA].

29. *Id.* §§ 556-57 sets out the APA requirements for formal trial-type hearings.

30. *E.g.*, 23 C.F.R. pt. I, Appendix A (1970), *implementing* 23 U.S.C. § 128(a) (1970).

31. 430 F.2d 891 (D.C. Cir. 1970).

32. 49 U.S.C. §§ 1482(d), (e) (1970). Under the usual statutory procedure, airline passenger rates charged by the airlines must be filed with the CAB and then only those rates can lawfully be charged. *Id.* §§ 1373(a)-(b). An airline may change an existing rate by filing a new fare schedule with the Board. *Id.* § 1373(c). However, by its own motion or on complaint the Board may suspend the new rate while undertaking an investigation of its lawfulness. *Id.* § 1482(g). In this investigation, following public notice and hearing, *id.* § 1482(d), the agency is to apply statutory criteria delineated in *id.* § 1482(e) in determining the reasonableness of the proposed rate changes and in requiring any adjustment it found to be necessary.

In *Moss*, by issuing a "fare formula" not arrived at after public notice and hearing and decision on the record, and announcing it would accept without suspension, rates filed by the airlines "implementing" that formula, the agency was obviously utilizing a procedure that was not foreseen by the statute and which undercut some of its procedural policies.

33. 430 F.2d at 900-01.

problem as involving

> the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.[34]

The court proceeded to overturn the agency determination. While noting that this was an arguably marginal case,[35] it stated that a public hearing should have been held on the proposed rate structure.[36]

Other recent court decisions have dealt with other dimensions of hearing requirements. In *D.C. Federation of Civic Associations v. Volpe*,[37] one of several reasons for reversing and remanding the Secre-

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34. *Id.* at 893.

35. "[I]t is true that the practice followed in this case does not fit neatly and precisely into the statutory concept of rate-making by the Board or by the carriers." *Id.* at 902.

36. *Id.* at 902. Clearly, the public hearing was required so that the agency would be forced to confront the effects of its decision on "public interest" values.

> [W]e emphatically reject any intimation by the Board that its responsibilities to the carriers are more important than its responsibilities to the public. Board action must always comply with the procedural requirements of the Statute and must always be based on an assessment of the relevant available data, with due consideration given to all the factors enumerated in the Statute, which factors taken together make up the public interest.

Id.

The set of sometimes conflicting values which Congress considered as making up the "public interest" were

> (1) The effect of such rates upon the movement of traffic;
> (2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;
> (3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;
> (4) The inherent advantages of transportation by aircraft; and
> (5) The need of each carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

49 U.S.C. § 1482(e) (1970).

37. 459 F.2d 1231 (D.C. Cir. 1972), *cert. denied*, 405 U.S. 1030 (1972).

In an earlier decision on this same case, D.C. Federation of Civic Ass'ns, Inc. v. Volpe, 434 F.2d 436 (D.C. Cir. 1970), Judge J. Skelly Wright, writing only for himself at this point of the majority opinion, went so far as to characterize the public hearing requirement as a "fundamental right" which, once granted by Congress to the public generally, could perhaps not be constitutionally withheld from some groups.

> [T]hese provisions of Title 23 are the only form of direct citizen participation in decisions about the construction of massive freeways, decisions which may well have more direct impact on the lives of residents than almost any other governmental action. . . . The Supreme Court has made it clear in a series of cases that the right of effective participation in the political process "is the essence of a democratic society, and any restriction on that right strikes at the heart of representative government."
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tary of Transportation's determination regarding the location and construction of a bridge on an interstate highway network was a failure to comply with hearing requirements set down in Department of Transportation regulations. The regulations required public hearings to be held on the issue of project location.[38] Although such a hearing had been held in 1964, the Secretary's approval of the project did not occur until 1969.[39] Although several different bridge locations were considered in the 1964 hearings, the project approved in 1969 differed from all of them. Even then, however, only a maximum location variance of 1500 feet and a minor redesigning of traffic ramps and interchanges was involved.

The district court had held that a new hearing was not required to satisfy the regulations because the change in plan was "so insubstantial that the public would not be affected any differently than [it would] by the original proposal which formed the basis for the first hearing. . . ."[40] The District of Columbia Circuit Court of Appeals refused to accept this determination, however, since it was not clear from the lower court record whether it had made a finding of fact on the possible effect of the change in the proposal.[41] Remanding for a factual determination, the court stated, "it is entirely conceivable to us that the differences in the plans would, in fact, have a substantially different impact on persons on both shores."[42] Thus, in a situation where significant conflicts among important values are likely to be involved, the court will insist that the required hearing deal precisely with all the important issues.

Yet another dimension of the hearing requirement, the sequence of the decisionmaking process, was the subject of recent litigation concerning a 1970 FCC policy statement.[43] The statement announced that sub-

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> We of course recognize that the right to participate in a highway hearing is not the exact equivalent of the right to vote on the project. However, the similarities between voting and the public hearing are strong. The purpose and the effect of a hearing may be the same as those of a vote. Both are designed to elicit the wishes of the "electorate."

Id. at 441-42 (citations & footnotes omitted).

What remains undeveloped here is an explanation linking the equal protection analysis approach underlying the above, *see id.* at 439-42 & nn.7-16, 24-27, to federal action.

38. 23 C.F.R. pt. I, Appendix A (1970), *implementing* 23 U.S.C. § 128(a) (1970).

39. This delay was due at least partially to a complex litigation and legislative history. Congress apparently attempted to reverse D.C. Federation of Civic Ass'ns, Inc. v. Airis, 391 F.2d 478 (D.C. Cir. 1968) with Pub. L. No. 90-495, 82 Stat. 827 (1968). Subsequent litigation ensued. D.C. Federation of Civic Ass'ns, Inc. v. Volpe, 308 F. Supp. 423 (D. D.C.), *rev'd* 434 F.2d 436 (D.C. Cir.), *on remand,* 316 F. Supp. 754 (D. D.C. 1970), *rev'd,* 459 F.2d 1231 (D.C. Cir.), *cert. denied,* 405 U.S. 1030 (1972).

40. 459 F.2d at 1243, *quoting* D.C. Federation of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 779 (D. D.C. 1970).

41. 459 F.2d at 1243.

42. *Id.*

43. *Policy Statement Concerning Comparative Hearings Involving Regular Renewal*

sequent hearings on broadcast license renewals would follow a two-step approach. There was to be an initial determination of the licensee's "substantial service to the community" in which challengers would be permitted to appear only to call "attention to the incumbent's failings."[44] If the Commission were to find at such a hearing that the incumbent did indeed have a record of "substantial service" to the community, he would be entitled to a renewal regardless of any promised superior performance by a challenger. Only if the agency found a lack of "substantial service" would a full comparative hearing considering competing license applications be held.[45]

In *Citizens Communication Center v. FCC*[46] the court rejected this proposed procedure, although it admitted the strong congressional pressure for its adoption.[47] The court held that a new applicant must always be given the chance to make the comparative showing necessary to displace an existing licensee.[48] At first glance this may seem to be an individual rights and fairness decision,[49] yet the court left no doubt as to the public interest considerations lying behind its determination:

> As new interest groups and hitherto silent minorities emerge in our society, they should be given some stake in and chance to broadcast on our radio and television frequencies. According to the uncontested testimony of petitioners, no more than a dozen of 7,500 broadcast licenses issued are owned by racial minorities. The effect of the 1970 Policy Statement, ruled illegal today, would certainly have been to perpetuate this dismaying situation.[50]

Thus, as in the situations discussed above, the court insisted upon public hearings thereby relying on the values and arguments to be raised by secondary interest groups[51] to force the agency to consider the effects

Applicants, 22 F.C.C.2d 424 (1970).

44. Citizens Communication Center v. FCC, 447 F.2d 1201, 1210 (D.C. Cir. 1971).

45. *Id.*

46. 447 F.2d 1201 (D.C. Cir. 1971).

47. *Id.* at 1210.

48. *Id.* at 1213.

49. That is, the statutory right of prospective new licensees to receive a full comparative hearing under the *Ashbacker* doctrine. *See* Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945).

50. 447 F.2d at 1213-14 n.36.

51. In this case the concepts of primary and secondary groups seem to run together. *See* note 3 *supra*. Obviously a challenger in a license renewal proceeding, motivated by a hope of obtaining the broadcast license for himself, is a paradigm example of what has been termed a "primary group." The court here, however, was obviously concerned with protecting the rights of one primary interest group (license challenger) at least

of its decision on such values. The court is not insisting that the values of a given secondary group must "win" in a specific case, but that they must be considered in a formal, open manner.[52]

Development of the Record

Functionally interrelated with the hearing requirements discussed above is an increasing judicial insistence on an adequate development of the administrative record. Requiring a hearing where secondary groups are allowed to raise interests that may be affected by administrative action

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partly in order to protect what it perceived as currently underrepresented social interests falling into a "secondary" classification.

52. This discussion of hearings has ignored the fact that the agency often has some leeway when, under its statutory mandate, its exercise of rulemaking powers is not required to be "on the record," to alter the safeguards provided by hearing requirements. It can do so by characterizing the decision as one of rulemaking under 5 U.S.C. § 553 (1970) rather than adjudication under *id.* § 554. This allows the use of the less strict procedural requirements of *id.* § 553. The utility of doing this for the operating efficiency of the agency per se has been extensively debated. *See, e.g.*, Fuchs, *Agency Development of Policy Through Rule-making*, 59 NW. U.L. REV. 781 (1965). *But see* Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reforms*, 118 U. PA. L. REV. 485 (1970).

If the rulemaking label is successfully applied in a given case, the nature of the court's inquiry will indeed change to some extent. It will then be "addressed to different materials" and

> inevitably varies from the adjudicatory model. The paramount objective [when reviewing rulemaking] is to see whether the agency, given an essentially legislative task to perform, has carried it out in a manner calculated to negate the dangers of arbitrariness and irrationality in the formulation of rules for general application in the future.

Automotive Parts & Accessories v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968). That the court will retain power to scrutinize the result, however, and to intervene and require an adequate explanation if it is certain that relevant values have not been spoken to, or fully considered, seems equally clear.

> We do expect that, if the judicial review which Congress has thought it important to provide is to be meaningful, the "concise general statement of . . . basis and purpose" mandated by [5 U.S.C. § 553 (1970)] will enable us to see what major issues of policy were ventilated by the informal proceedings, and why the agency reacted to them as it did.

Id.

It also seems clear that more lies in the background here than simply congressional intent in providing for judicial review. Something would seem to remain of the old nondelegation doctrine.

> [C]learly, rule-making is the action of a body subordinate to the legislature. That the same deference accorded "findings" of the legislature is not to be given the findings of the Commission is implicit in the law governing legislative delegation of authority. Were the "findings" of the Commission in a rulemaking proceeding automatically exempt from judicial review, the law governing delegation would also become little more than formalistic mutterings. . . . [T]he Commission has broad discretion to seek a given objective either through *ad hoc* adjudicatory proceedings or through rule-making. To argue that, if the latter route is followed, judicial inquiry into the factual basis for the agency's action is impermissible, is to say that in large measure the agency itself has the discretion to determine whether its action will be subject to meaningful review.

City of Chicago v. FPC, 458 F.2d 731, 742 (D.C. Cir. 1971). *See also* note 110 *infra*.

would be of less utility if the agency were not forced to address itself to their arguments, and incorporate the values raised into the ultimate administrative decision. Where the development of an administrative record is required, as in formal, trial-type hearings, these social interests must be considered by the agency and taken into account in the final outcome.[53] Therefore, although the agency, consistent with "law and the legislative mandate" has "latitude not merely to find facts and make judgments but also to select the policies deemed in the public interest," it is becoming increasingly common for the court to ensure that "the agency has given reasoned consideration to all the material facts and issues."[54]

As noted above, a record is required in many instances by statute or regulation. However, even where no hearing of any type is required, the use of the "adequate record" requirement is being expanded as a judicial supervisory tool. Once the court decides that judicial supervision is called for,[55] it will ascertain whether the issues raised by the secondary

53. *See, e.g.*, Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608, 612 (2d Cir. 1965).

54. Greater Boston Television Corp. v. FCC, 444 F.2d 841, 851 (D.C. Cir. 1970). Thus, judicial review of administrative determinations has increasingly focused on assuring

> that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts, a course that tends to assure that the agency's policies effectuate general standards, applied without unreasonable discrimination.

Id.

The benefits of this judicial insistence upon an adequately developed record are not limited to the possibility of an altered judgment on the merits:

> Reasoned decision promotes results in the public interest by requiring the agency to focus on the values served by its decision and hence releasing the clutch of unconscious preference and irrelevant prejudice. It furthers the broad public interest of enabling the public to repose confidence in the process as well as the judgment of its decision-makers.

Id. at 852 (citations omitted).

55. The literature on the initial judicial decision to review an administrative decision has been engulfed by a running debate between Professors Davis and Berger over the proper construction of the "committed to agency discretion" exemption of the APA, 5 U.S.C. § 701 (1970). *See, e.g.*, Berger, *Administrative Arbitrariness: A Synthesis*, 78 YALE L.J. 965 (1969); Davis, *Administrative Arbitrariness is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967); Berger, *Administrative Arbitrariness: A Sequel*, 51 MINN. L. REV. 601 (1967). The latest Supreme Court case on the subject, Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), resolves to some degree the controversy by holding the exemption to be "a very narrow exception," *id.* at 410, *citing* Berger, *Administrative Arbitrariness and Judicial Review*, 65 COLUM. L. REV. 55 (1965). The exception "is applicable in those rare instances where statutes are drawn in such broad terms that in a given case there is no law to apply." 401 U.S. at 410 (citation omitted). It is unlikely, however, that this single broad holding will resolve all the problems in the area. For some of the considerations involved see Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367 (1968).

group, even if raised for the first time in litigation, have been adequately accounted for in a reasoned explanation.

One instance of this expanded use of the "adequate record" requirement is found in *Environmental Defense Fund, Inc. v. Hardin*,[56] an earlier phase of the *Environmental Defense Fund, Inc. v. Ruckelshaus* litigation discussed above.[57] In *Hardin* the initial question was whether the Secretary's failure to issue the "notice of cancellation" was judicially reviewable. In effect, the Secretary had done nothing: he had made no initial study of the poison's legality, and had remained silent in the face of the environmental group's request.[58] The court found a meaningful review of the Secretary's refusal to issue the cancellation order "impossible in the absence of any record of administrative action,"[59] and remanded the case to the agency for an initial determination; "the basis for that decision should appear clearly on the record, not in conclusory terms but in sufficient detail to permit prompt and effective review."[60] As a result of the requirement of a detailed record, the agency is forced by the court to speak to the issues raised by the petitioners.

An alternative approach in record development where none is required by statute or regulation was used by the United States Supreme Court in *Citizens to Preserve Overton Park v. Volpe*[61] in which the petitioner sued to enjoin construction of an interstate highway authorized by the Secretary of Transportation allegedly in violation of a federal statute.[62] After construing the statute in question, the Court, in the absence of an administrative record before it, was unable to determine whether the agency had complied with it. However, the Court did not remand the decision to the Secretary of Transportation for hearings and

56. 428 F.2d 1093 (D.C. Cir. 1970).
57. *See* text accompanying notes 8-14 *supra*.
58. 428 F.2d at 1099.
59. *Id.*
60. *Id.* at 1100.
61. 401 U.S. 402 (1971).
62. It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. . . . [T]he Secretary shall not approve any program or project which requires the use of any publically owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.
49 U.S.C. § 1653(f) (1970); 23 *id.* § 138.

a determination of formal findings on the record.[63] Rather, it remanded to the district court to consider any available administrative materials ("record") to see if the agency decision was justified.[64] Noting, however, that the "bare record . . . before the Secretary at the time he made his decision" might not include all of the factors he actually considered, the Court concluded that the district court might have to require some explanation in order to determine if the Secretary's decision was justified.[65] Specifically, the lower court could "require the administrative officials who participated in the decision to give testimony explaining their action."[66]

Thus, in examining the available administrative record, the lower court will attempt to determine whether the factors raised by the intervening groups were appropriately considered by the agency. If such a determination cannot be made, the administrators could presumably be forced to speak to such issues in testimony explaining their action.

The increasing importance of the administrative record (internal documents, studies, correspondence, etc.) in instances where no formal findings are required of the agency, but where the court will review the ultimate decision is discussed in *D. C. Federation of Civic Associations v. Volpe*.[67] Indeed, in that case, the court developed a near-presumption against the validity of an administrative determination of a complex question in the absence of an internal administrative record.

> Our review of the Secretary's determination is hindered not only by the lack of any formal findings, but also by the absence of a meaningful administrative record within the Department of Transportation evidencing the fact that proper consideration has been given to the requirements of this section. . . . [T]he complete non-existence of any contemporaneous administrative record is . . . serious. . . . [I]t is hard to see how, without the aid of any record, the Secretary could satisfactorily make the determinations required by statute. The absence of a record, in other words, simultaneously obfus-

63. This was the approach advocated in the separate opinion of Justices Black and Brennan. 401 U.S. at 421-22.

64. *Id.* at 420.

65. *Id.* The district court was, however, given the alternative of requiring the Secretary to prepare formal findings speaking to the issues involved. *Id.* at 420.

66. *Id.* at 420. This clearly undercut to some extent the longstanding United States v. Morgan, 313 U.S. 409 (1941), holding against inquiry into the mental procesess of decisionmakers.

67. 459 F.2d 1231 (D.C. Cir. 1972).

cates the process of review and signals sharply the need for careful scrutiny.[68]

Thus, from these various ways of reconstructing an administrative record, even where no formal hearing or findings are required, the courts can ensure that the administrative agencies consider the appropriate social values necessarily affected by their decisions.

The Effect of Imposition of Procedural Standards On the Agency as a Decisionmaking Institution

The emphasis on public hearing requirements and judicial insistence on the development of an adequate administrative decisionmaking record are functionally interrelated. The utility of the public hearing is likely to be great only if the agency is forced to speak to the concerns voiced at a hearing and forced to rank such interests with other competing values in reaching the ultimate decision. This result can generally be achieved by requiring an "adequate record." Conversely, the utility of an adequate-record requirement may be dependent on a public hearing requirement.[69] What constitutes an "adequate administrative record" in a specific fact situaton will be partially a function of the issues which are raised by the secondary public group. The agency, and the court itself on review, are dependent on the secondary public groups to present arguments and to marshal evidence concerning the extent to which important values are likely to be affected by a given decision. In situations of extreme complexity, where cause and effect chains are likely to be never ending, the focus of the agency and the subsequent scrutiny of the court may be limited to those issues legitimately raised by the secondary public groups.

This dependence by agencies and courts on public interest input may aid in the explanation of the now famous language of *Scenic Hudson Preservation Conference v. FPC*.[70]

> [T]he Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

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68. *Id.* at 1237-38 (citations omitted).

69. Such utility may also be dependent upon secondary group standing to argue "public interest" considerations upon judicial review of administrative determinations where no hearing is required.

70. 354 F.2d 608 (2d Cir. 1965).

> . . . The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts.[71]

This language is somewhat deceptive. If read literally, it would impose an awesome responsibility on the agencies and the courts to be certain that *all* "relevant facts" have been considered, and that the record is in this sense "complete."[72] Rather, the *Scenic Hudson* opinion should be taken to mean that the agency may not merely listen to the arguments on both sides and them simply announce its decision by reciting

> *all the evidence* and *arguments* advanced by *all* the parties, and then, without indicating any preference or choice, stating that on the basis of *all* the evidence and *all* the arguments pro and con and *all* the policy factors present, the following decision is made.[73]

It is not possible to conclude from a recitation of "facts" which values are and which are not to be enhanced.[74] In the absence of statutory standards, a political choice must be made by the agency. While the agency has, within limits, discretion to rank values and develop policy in the context of a given situation, *Scenic Hudson* says it must do so affirmatively and publicly. Any actual decision must then be justified in terms of the policy so developed.

Neither *Scenic Hudson* nor subsequent cases have specified a general criterion for courts in determining which values or factors should be woven into the rationale of a particular administrative decision. A reasonable criterion would begin by focusing upon those factors[75] which secondary interest groups succeed in convincing the court should be legitimately considered in light of both the general legal framework[76] and the specific

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71. *Id.* at 620.

72. *See* Sive, *Some Thoughts of An Environmental Lawyer in the Wilderness of Administrative Law,* 70 COLUM. L. REV. 612, 638-39 (1970) [hereinafter cited as Sive].

73. Kramer, *supra* note 21, at 69-70 (emphasis in original).

74. "Decision criteria are not inferences from evidentary proof and thus are not a function of fact determinations." Grundstein, *supra* note 4, at 129.

75. Of course, the agency would also consider any legitimate factors traditionally considered by it and those, if any, raised by involved primary groups.

76. *Cf.* Robinson, *On Reorganizing the Independent Regulatory Agencies,* 57 VA. L. REV. 947 (1971) (arguing that the function of judicial review is not so much to check for the "correct" expert decision as one of holding "expertness" accountable to more generalized legal rules and public interest norms); JAFFE, *supra* note 1, at 590. Jaffe argues:

> [T]he statute under which an agency operates is not the whole law applicable to its operation. An agency is not an island entire of itself. It is one of many rooms in the magnificent mansion of the law. The very subordination of the agency to judicial jurisdiction is intended to proclaim the premise that each

statutory purpose.[77] Next, from among this initial group of legitimate factors, the courts should ultimately require the agency to consider only those factors which will be significantly affected by the administrative decision. Courts should require that significant impact be established by substantial evidence, a burden which must be borne by the secondary interest groups.[78]

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agency is to be brought into harmony with the totality of the law. . . . Thus in the review of administrative actions a court may appeal to criteria of validity which have no specific locus in the statute.

Id. *See also* Sive, *supra* note 72, at 637-38.

77. Statutory purpose may itself in a given case lead to consideration of a broad range of factors since the "goals" of the statute may in reality be the goals of many different interest groups, all of whom were necessary parties to the political coalition pushing the statute to fruition.

> Clearly one should not accept literally the stated goals of the law. . . . [M]ore often than not, important goals of the law are not set out in the text. Any complex law arises out of a complex background; it is the result of compromise between interested parties. In the background of urban renewal there were urban planners and reformers concerned about the shape and beauty of cities. There were housing reformers eager to clear the slums. There were mayors anxious for showpiece projects in their cities. There were spokesmen for the poor, the middle class, and the rich. Even on paper, urban renewal is a tangled web of compromises and reciprocal accommodations. The blunt political fact is that the program has no one overriding goal.

Friedman, *Social Welfare Legislation: An Introduction*, 21 STAN. L. REV. 217, 219-20 (1969) (footnotes omitted).

78. It could be argued that this expanded public participation approach results in issues being raised which are largely superfluous to the tasks entrusted to the administrative agency by the legislature. The argument is that the "correctness" of agency decisions should be the prime judicial concern; the structuring of or failure to structure a given set of values in an administrative decision should be evaluated only in light of "rational" considerations. Thus, any given value choice (*i.e.*, choosing to enhance, deemphasize or ignore altogether a value in the context of a specific fact situation) should be evaluated in terms of "does this decision form a rational means to achieving the higher goal as expressed by the statutory purpose." *See* H. SIMON, ADMINISTRATIVE BEHAVIOR 62 (1957 ed.) [hereinafter cited as SIMON]. Indeed, this seems to be what is done by the courts with the traditional approach of labelling a given value choice a "question of fact" to be evaluated by the substantial evidence test, or by calling a given determination an "application of a statutory standard" to a set of facts, which is to be judged by a "reasonable basis in the law" test. *See generally*, Kramer, *supra* note 21, at 84-85.

There are two problems with this analysis considering the types of cases discussed herein. First, the "higher goal" is often nonoperational; the connection between it and the immediate value choice is only very vaguely if at all capable of evaluation in terms of cause and effect. If the higher goal expressed in the statute is, for example, the "public interest," then the decision to build a power plant at a given site, cutting against aesthetic interests, cannot in any realistic sense be judged in terms of the decision rationally promoting the attainment of the higher value. The promotion of power generating capacity at the expense of aesthetic concerns has been identified by the agency as *the* "public interest." It is the highest or ultimate goal in any operational sense.

Second, a given behavioral choice, structuring a set of immediate values in order to affect a higher value may in fact have consequences for more than one means-end chain. For example:

> A relief policy, for example, in which family budgets are set at a very low level in order to provide clients with an incentive to seek and accept private employment, may also have as its consequences a high incidence of malnutrition

Thus, contrary to the admonition of *Scenic Hudson,* it is precisely more of an umpire's role[79] into which the administrative process is being molded by these judicial decisions. As the courts lose faith in the ability of the administrative agencies to adequately serve as advocates of the various public interests, they are insisting upon a revised model for the administrative process.[80] The task of pointing out the values which are likely to be significantly affected and of amassing evidence concerning causal relationships is being increasingly entrusted to the secondary public groups. The agency is being cast in the role of the formal decisionmaker —still allowed to choose and to develop policy, but forced to confront such values in the final choice.

An example of the extremes to which the courts are increasingly willing to go in altering the nature of the administrative process can be

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and disease among the families of relief clients. An acceptible policy cannot be determined merely by considering one of these means-end chains and ignoring the other.

SIMON, *supra,* at 75. Even though a given value choice may seem to rationally promote the higher end expressed in the enabling statute, it may have adverse consequences for other higher values which, even though Congress was silent on the point, logically seem deserving of consideration in light of their social importance as expressed in the general legal framework.

79. *Cf.* Williams, *An Evaluation of Public Participation,* 24 AD. L. REV. 49, 60-61 (1972).

> Until a short time ago, it was assumed that the government agency itself represented the public interest. In its proceedings and deliberations there was conceived to be a two party adversary stance . . . .
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> . . .
>
> . . . We no longer view our administrators as the sole representatives of the public interest. They have been pushed into a somewhat quasi-judicial role of more passively deciding among competing considerations. The adversaries are the regulated business and economic interests on the one hand and the consumer and general public on the other. These adversaries present their conflicting points of view to the agency or administrator for ultimate resolution.

Id. See also Comment, *supra* note 26, at 723-30.

80. *Cf. Office of Communication of United Church of Christ v. FCC,* 359 F.2d 994 (D.C. Cir. 1966). In that case, now Chief Justice Burger considered the legal standing of a "public interest" group to appear before the FCC in a license renewal proceeding:

> The theory that the Commission can always effectively represent the listener interests in a renewal proceeding without the aid and participation of legitimate listener representatives fulfilling the role of private attorneys general is one of those assumptions we collectively try to work with so long as they are reasonably adequate. When it becomes clear, as it does to us now, that it is no longer a valid assumption which stands up under the realities of actual experience, neither we nor the Commission can continue to rely on it.

Id. at 1003-04. He later stated:

> Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining constant surveillance over every licensee, some mechanism must be developed so that the *legitimate* interests of listeners can be made a part of the record which the Commission evaluates.

Id. at 1005.

seen in *Hanly v. Kleindienst*[81] where the court insisted upon public participation in the absence of any statutory or administrative provisions. In *Hanly,* plantiffs alledged that the General Services Administration had failed to comply with the National Environmental Policy Act of 1969,[82] and sought to enjoin the construction of correctional facilities in an area of mixed residential, business and governmental activities.[83] NEPA requires a detailed environmental impact statement for every major federal action "significantly affecting the quality of the human environment."[84]

81. 471 F.2d 823 (2d Cir. 1972).

82. 42 U.S.C. §§ 4321-47 (1970) [hereinafter referred to as NEPA].

83. In the earlier case of Hanly v. Mitchell, 460 F.2d 640 (2d Cir. 1972), plaintiffs had sought the same injunctive relief against construction on the grounds that NEPA requirements, 42 U.S.C. § 4332(2)(C) (1970), calling for a detailed environmental impact statement for every major federal action "significantly affecting the quality of the human environment," had not been met. The court had remanded to the agency for a more detailed threshold determination of whether the proposed project was a "significant" one in terms of affecting the quality of the human environment (which if it was found to be, would trigger the mechanism requiring a detailed environmental impact statement).

> [T]he agency was required to give attention to other factors that might affect the human environment in the area, including the possibility of riots and disturbances in the jail which might expose neighbors to additional noise, the dangers of crime to which neighbors might be exposed as the consequence of housing an out-patient treatment center in the building, possible traffic and parking problems that might be increased . . . and the need for parking space.

471 F.2d at 827.

84. 42 U.S.C. § 4332(c) (1970) provides:

> The Congress authorizes and directs that, to the fullest extent possible: . . . (2(c)) all agencies of the Federal Government shall—
>
> . . .
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible officials on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5 and shall accompany the proposal through the existing agency review processes; . . . .

Id. §§ 4332(2)(c)(i)-(v).

A threshold determination of the GSA had concluded that the siting and construction was not an action significantly affecting the environment and thus did not require an impact statement.[85] In *Hanly,* a challenge of the adequacy of the threshold determination presented the court with the question of determining the meaning of the statutory term "significant." The problem, in the court's words, was that:

> . . . [W]e are faced with the fact that almost every major federal action, no matter how limited in scope, has *some* adverse effect on the human environment. It is equally clear that an action which is environmentally important to one neighbor may be of no consequence to another.[86]

The court decided that in the absence of "some rudimentary procedures . . . designed to assure a fair and informed preliminary decision," an agency "lacking essential information, might frustrate the purpose of NEPA by a threshold determination that an impact statement is unnecessary."[87] Therefore, despite "the absence of statutory or administrative provisions on the subject," the court held that

> before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear on the agency's threshold decision.[88]

Furthermore, the court said a full-fledged hearing must be provided in some cases.[89]

Clearly then, this case reveals a situation where the court believes that a number of major values or interests may be involved in a given administrative determination and these values must be considered and balanced in the administrative record. Since neither the court nor the agency can be certain which values will be significantly affected in the context of a specific factual situation, the court will require public access

85. 471 F.2d at 827-28.
86. *Id.* at 830.
87. *Id.* at 835.
88. *Id.* at 836.
89. The necessity for a hearing will depend greatly upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action.

Id. See also A Quaker Action Group v. Morton, 460 F.2d 854 (D.C. Cir. 1971). "The law is only beginning to insist on provisions for oral testimony, in appropriate cases, prior to the issuance of administrative regulations." *Id.* at 861.

to the decisionmaking process, and insist that the agency "affirmatively develop a reviewable environmental record"[90] responding to those values that are raised by secondary public groups. The agency must develop policy, but which variables will be formally incorporated in that policy will, in a given case, be partially a function of the legitimate values that secondary public groups will raise.

THE INTERRELATIONSHIP OF PROCEDURAL AND SUBSTANTIVE STANDARDS

Thus far, judicial insistence upon substantive standards on the one hand, and public-influence oriented procedural standards on the other, have been treated as entirely separate categories. However, it should be recognized that the effects of the application of these requirements may at some point become indistinguishable. In the first place, the various procedural requirements which mandate the development of policy with reference to the values of secondary interest groups are likely to be involved in any proceeding involving the development of generalized substantive standards. Second, the requirement of an adequate record in a specific case will, as discussed above, result in an express policy determination which explains and justifies the particular administrative decision. If such a policy determination should be deemed entitled to some stare decisis weight in subsequent analogous decision situations, the result will approach the requirement of generalized substantive standards.[91] Conversely, a court may lay down a requirement that agencies must articulate substantive standards of general applicability in specific cases from which they may subsequently deviate where appropriate. Appropriate cases would include those where the decision environment faced by the agency has significantly changed or where the agency, in a reasoned opinion, openly shifts its policy after demonstrating that its previous policy was based on faulty reasoning or had led to unforeseen and undesirable consequences. The effect of this court requirement is quite similar to requiring an adequately developed record where the record states a policy which is later given stare decisis weight. The difference between the requirements is not one of kind, but it is rather one of the degree to which the results and policies of one decision are generally applicable to subsequent decisions.

The degree of general applicability that the courts will require of

90. 471 F.2d at 836.

91. When a court holds only that the agency must articulate its rationale in terms of the specific facts of the case at hand, rather than in terms of standards which shall apply to all foreseeable future cases, a decision criteria—a structured relationship involving the significant values at issue in the decision—which is in some sense the "law," if only for the given case, is being required.

policies developed by the agency will depend upon the "manageableness" of the problems with which the agency is attempting to cope. Variables that seem likely to be involved here are: (1) the degree of agency experience in the area; (2) the relative stability of the agency's decision environment; (3) the complexity of the decision environment as measured by the availability of technology for measuring and evaluating effects of alternative decisions on the values affected;[92] and (4) the extent to which the agency's statutory mandate has resolved the value conflicts necessarily involved in the decision. The degree to which courts will require agencies to formulate general standards, either by procedural or substantive means, should depend upon the court's assessment of these variables.

WILL IT MAKE ANY DIFFERENCE?

Having indicated the greater supervisory role the courts are assuming over administrative decisionmaking methodology, questions still remain about the effects of these requirements. Will their imposition change the substantive results of agency decisions, or will the agency tend to simply "recast its rationale and [reach] the same result?"[93]

To some extent, any probable change in outcome will be a function of the general applicability of the standards required by the courts. The more general the decision criteria, the more it will tend to confine future agency choice given strict subsequent judicial scrutiny. An example of the potential effects of relatively generalized standards can be seen in *Environmental Defense Fund, Inc. v. EPA,* which followed the *Hardin —Ruckelshaus* line of decisions involving the FIFRA.[95] In *Ruchelshaus* the court had required the agency to develop standards for governing administrative decisions concerning immediate suspension of economic poisons once a decision to issue the cancellation notice had been made.[96] The criteria subsequently developed by the agency included

92. For a discussion of an area where such technology is only rudimentary if existent at all, and the consequent implications for the administrative process, see Tarlock, *Balancing Environmental Considerations and Energy Demands: A Comment on Calvert Cliffs' Coordinating Committee, Inc. v. AEC,* 47 IND. L.J. 645 (1972). It may be, however, that as technology improves, and as better models are built (making cause and effect links between higher and lower order values better understood, *see* Boyer, *Alternatives to Administrative Trial-Type Hearings for Resolving Complex Scientific, Economic, and Social Issues,* 71 MICH. L. REV. 111, 156-57 & nn.160-61 (1972) [hereinafter cited as Boyer], the decision problems may at the same time become more complex as effects of a given decision on "higher order" values other than the one intended to be affected are uncovered.

93. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

94. 465 F.2d 528 (D.C. Cir. 1972).

95. *See* notes 8-14, 56-60 *supra* & text accompanying.

96. *See* notes 12-14 *supra* & text accompanying.

> The type, extent, probability, and duration of potential or actual injury to man, plants and animals . . . measured in light of the positive benefits accruing from, for example, use of the responsible economic poison in human or animal disease control or food production.[97]

The plaintiffs in *Environmental Defense Fund* brought suit to require the immediate suspension of two pesticides, aldrin and dieldrin, for which cancellation notices had been issued. In its statement of reasons for refusing the immediate suspension of the poison, the agency had discussed the immediate dangers involved in continued use of the poison, but had not explicitly considered the benefits to be expected. The court said of the standards developed by the agency:

> We are not clear that the FIFRA *requires* separate analysis of benefits at the suspension stage. We are clear that the statute *empowers* the Administrator to take account of benefits or their absence as affecting imminency of hazard.[98]

Since the agency had included an analysis of benefits in its previously developed standards, the court held the agency bound by such standards in this instance. Analogizing the standards developed by the agency to judicial standards involved in the issuance of a preliminary injunction,[99] the court remanded to the agency for an explicit statement of the benefits expected from a continued use of the poison which would be weighed against the expected liabilities.[100]

It is hard to escape the impression that judicial supervision of the administrative process makes a difference in this situation. The agency will not easily be able to "recast its rationale and reach the same result." It will have to speak to the issues embodied in the standards it has developed, and meet some minimum evidentiary burden to support its decision. The agency cannot manufacture evidence out of thin air, and must always make findings with respect to any evidence presented by the "adverse parties."[101] Certainly, in relatively close cases, agency discretion

97. 465 F.2d at 535.

98. *Id.* at 538 (emphasis added & footnote omitted).

99. Judicial doctrine teaches that a court must consider possibility of success on the merits, the nature and extent of the damage to each of the parties from the granting or denial of the injunction, and where the public interest lies. *Id.* at 539.

100. *Id.* at 541.

101. Where the court is convinced that secondary groups and the value interests they raise have received hostile treatment at the hands of the agency, the court may not only reverse the determination, but also impose a final judgment. *See* Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543 (D.C. Cir. 1969).

will be exercised. However, the possibility of judicial review involving an evaluation of evidence in light of relevant standards[102] should make a difference, at least as much as the threat of appellate reversal influences any lower court determination on the issuance of a preliminary injunction.

While some of the effects of the judicially imposed requirements depend upon the general applicability of the standards developed by the agency, other effects are also predictable whenever such requirements are imposed. First, as a result of a public ordering of the values involved in the administrative decision, agency approval of a policy is known and is visible to the interest groups affected by the policy determination. At a minimum, if a given value is discounted[103] in a reasoned, public statement of policy, such a determination should be relatively more susceptible to "legitimate" forms of political influence and control and less susceptible to the "illegitimate."[104]

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102. Evidentiary questions will be reviewed on the substantial evidence test, 5 U.S.C. § 706(2)(E) (1970), if such findings are required by the APA to be made pursuant to the "on the record" rule-making provision of the Act, *id.* § 553(C), or an "on the record" adjudicatory hearing, *id.* § 554. The Supreme Court in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), seems to have also said in dictum that the substantial evidence test will apply even to the less formal modes of rulemaking under 5 U.S.C. § 553 (1970) when this is less than obvious from the face of the statute, *id.* § 706(2)(E), providing for judicial review. 401 U.S. at 414. Otherwise the "abuse of discretion" standard will usually apply, 5 U.S.C. § 706(2)(A) (1970). *See* 401 U.S. at 414. The Federal Courts of Appeals currently employ two different standards for reversal of administrative decisions for "abuse of discretion."

> One interpretation equates "abuse of discretion" to the "clearly erroneous" standard which calls for rather broad review of the findings made by a trial judge [*In Re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954)]. Another, narrower reading of the test would find an abuse of discretion only if the action "were made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis . . ." [Wong Wing Hang v. Immigration and Naturalization Serv., 360 F.2d 715, 719 (2d Cir. 1966)]. *Overton Park* somewhat unhelpfully cites cases stating both versions.

McCabe, *Recent Developments In Judicial Review of Administrative Actions: A Developmental Note*, 24 AD. L. REV. 67, 96 (1972). Obviously, the choice of tests used by the court in a given case will affect the relative influence of the judicial techniques discussed in this note. Perhaps the test that will actually be used in a given case will be pragmatically chosen, depending in part on such variables as the true need for "expertness" in evaluating the phenomena involved and the relative confidence of the court in the integrity of the administrative process involved in the particular case.

> [A]ssertions of discretion inevitably raise questions of degree which must be appraised in the context of the relevant provisions of law and the nature of the particular action sought to be reviewed.

Medical Committee for Human Rights v. SEC, 432 F.2d 659, 673 (D.C. Cir. 1970).

103. As indeed, some inevitably must be because values conflict. On the ubiquity of social conflict see R. DAHRENDORF, CLASS AND CLASS CONFLICT IN INDUSTRIAL SOCIETY 157-206 (1957).

104. *Cf.* J. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES 22-23 (1962).

> The revulsion against the revelations of pressure on the commissions from businessmen, legislators, and executive branch has been too much concerned

Second, to the extent that administrative decisions are "intendedly rational" in terms of organizational objectives,[105] behavioral principles would predict a change, to some degree, from the traditional results of administrative choice. For example, agencies may, over time, become less favorably oriented toward the industries which they are charged to regulate. Professor Jaffe has commented on the administrative agencies "maturing" over time, and becoming to some degree "captive" of those social institutions intended to be the regulated.

> [T]he phenomenon loosely and invidiously described as "industry orientation" is much less a disease of certain administrations than a condition endemic in any agency which seeks to perform such a task. It is a product of our political philosophy with its insistence on representation and the procedure through which representation functions, of our legislatures which are organized to register all significant groups, of our statutes which grant powers so wide that solutions will be much more the consequence of group interaction than of legislative formulation. . . .[106]

It is not necessarily incompatible with Professor Jaffe's thesis to argue that industry orientation could be described as a predictable consequence of the old adversary model where agencies were expected to be both arbiters and advocates of the public interest.[107] Industry orientation is, after all, simply placing a relatively high priority on those values advocated by the primary group and a low priority on conflicting values of other social groups, if such values are considered at all. If the information with which a particular decisionmaking institution is constantly confronted is one-sided, if the arguments it has to meet and the values which it must formally address derive predominately from one particular interest group, we would expect, eventually, a relatively one-sided orientation.

> with the symptoms and too little with the cause. . . . [A]s the administrators sharpen their standards for decision, they will not only end the cruder forms of influence from interested individuals, but also will reduce pressures from the executive and from Congress. . . . [T]his does not mean that there would or should be an end to efforts to persuade agencies to alter rules that have become outmoded, or are contended to be; but such efforts . . . would then be in the open, and related to the rule rather than the case.

Id.

105. This phrase means essentially that administrators are conscientiously trying to make the best decisions they can, given limited information and limited capacity to process it. *See generally* SIMON, *supra* note 78, at 38-41.

106. JAFFE, *supra* note 1, at 13.

107. *See* note 79 *supra.*

This explanation is consistent with how this phenomenon might be analyzed by a behavioral scientist.

> [I]n actual behavior, as distinguished from objectively rational behavior, decision is initiated by stimuli which channel attention in definite directions, and . . . the response to the stimuli is partly reasoned, but in large part habitual. The habitual portion is not, of course, necessarily or even usually irrational, since it may represent a previously conditioned adjustment or adaption of behavior to its ends.
>
> . . .
>
> Not only do the stimuli determine what decisions the administrator is likely to make, but *they also have a considerable influence on the conclusion he reaches. An important reason for this is that the very stimulus which initiates the decision also directs attention to selected aspects of the situation, with the exclusion of others.*[108]

To the extent that this analysis is accurate, we should certainly expect different results over a period of time as secondary public groups raise their arguments, and as the courts force the agencies to consider such values in a formal way in context with those of the primary group. This is not to say that any *particular* value will prevail in an immediate case, or even over time, in the absence of legislative or executive intervention. The point is that the values presented by secondary interest groups should receive generally more favorable treatment and their influence over the ultimate decisions should relatively increase.

Finally, we would expect administrative decisions gradually to become relatively less binary and more reflective of the variety of interests involved.[109] Many decisions need not ultimately be a "yes" or "no" choice. Although the interests of the intervening secondary public groups may not "win," their values nonetheless may be served to some greater extent than would otherwise be true.

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108. SIMON, *supra* note 78, at 91-92 (emphasis added). *See also id.* at 210-12.

109. For an example of this phenomena, compare the initial, rejected Federal Power Commission decision described in Scenic Hudson Preservation Conference v. FPC, 354 F.2d 608 (2d Cir. 1965) with the ultimate outcome approved in Scenic Hudson Preservation Conference v. FPC, 453 F.2d 463 (2d Cir. 1971). *See also,* A Quaker Action Group v. Hickel, 429 F.2d 185 (D.C. Cir. 1970), which rejected a single value approach focused on violence by requiring judicial examination of the feasibility of other regulatory provisions that would "provide satisfactory safeguards against violence with less interference with the right of peaceful protest." *Id.* at 187.

CONCLUSION

Currently the beginnings of a creative judicial approach regarding administrative agencies can be detected. This approach ensures that the decisions of agencies will become in some sense more democratic, that is, more susceptible to influence by broader segments of the affected public, and relatively more "law-like" by becoming more reasoned and consistent.[110] This is not to maintain that we have arrived at the best of all possible worlds. One obvious problem with this evolving administrative model is that not all of the affected public interests will have their viewpoints argued before the agencies due to such obstacles as inadequate time, money or information.[111]

A second limitation of this approach is that it will do nothing to ameliorate the current problem of agencies being saddled with trial-type procedures for making "management" decisions.[112] A "management"

110. As is many times true in the law of judicial review of administrative decisions, it is not always clear to what extent constitutional elements, as opposed to optional congressional grants of jurisdiction (making a given decision "reviewable,") compel a given article III court's insistence on administrative standards for decisionmaking. It is clear that some constitutional elements lurk in the background, however, either in the form of the old "nondelegation" doctrine, perhaps still alive to some degree, *see* Amalgamated Meat Cutters & Butchers Work. v. Conally, 337 F. Supp. 737 (D. D.C. 1971), or in some "rule of law" substitute therefore. *See, e.g.*, Kramer, *supra* note 21, at 6-8. Indeed, Judge Bazelon in Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584 (D.C. Cir. 1971), specifically referred to the Davis argument that a "standards" requirement may be a functional, and a more workable, substitute for the old nondelegation doctrine. *Id.* at 598 n.55, *citing* K. DAVIS, DISCRETIONARY JUSTICE 57-59 (1969).

111. See the suggestions for a more "guaranteed" form of "public" representation in the regulatory process in Lazarus & Onek, *The Regulators and the People*, 57 VA. L. REV. 1069, 1094-106 (1971).

112. *See* Boyer, *supra* note 92, at 137-64. It seems that Boyer is assuming away the type of problems discussed in this note, *see* note 78 *supra*, when he says:

> On the theoretical level, it seems likely that most of the problems confronting administrative agencies would prove capable of solution through application of general principles—if social-value preferences where sufficiently established so that the choice among conflicting policies applicable to a given matter were clear . . . .

Id. at 118-19. It is precisely where the social preferences are *not* clear before the agency decides and *where the agency has been delegated the task of constructing such a preference function* that the problems discussed herein arise. It is not possible to talk about "optimal tradeoffs" between conflicting values, *see id.* at 138, and alternative institutional arrangements to trial-type hearings being more likely to achieve "accurate" decisions *until* such a social preference function has been decided upon.

It might be argued that it is theoretically possible to develop a preference function through "value-free" methods of cost/benefit analysis. The theory would be that all social values involved are reduced to a common unit of measurement and the alternative choices involving the values arranged in order of their net social "payoffs." One objection to such a theory is that the process of scaling and assigning weights to the different social values in order to reduce them to a common denominator will in fact be a less than neutral process. *See id.* at 140. But even were this not true, we would still not have a value-free preference function because a "redistribution of income" will almost inevitably result. Even if the total net social payoff is greatest when, for example, an

determination is one which is capable of being rationally evaluated in terms of "correctness" because the societal value structure has already been determined, either by an elaborate statute, past agency development of generalized standards, or, more improbably, a true social consensus.[113]

It should be obvious, however, that the solutions to such problems lie beyond the capacity of the federal judiciary as an institution. Considering the effective limits of the federal courts under Article III of the Constitution,[114] this evolving approach seems to be an extremely imaginative response to a set of serious problems. Cries will be heard of delay and hindrance of administrative efficiency as administrative determinations are overturned on methodological grounds. What must be understood, however, is that efficiency is a meaningless objective until the relevant conflicting values have been fitted into a system of social priorities. By insisting that the agencies develop and utilize a hierarchy of social values, these judicial techniques will not only secure more democratic influence over some of our governing institutions, but should also make these institutions more efficient in a meaningful sense.[115]

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electrical generating project is located at a given site as opposed to any other alternative, the distribution of this net payoff will be uneven, and it would be an unusual case where some significant groups do not end up as clear net losers. This decision and resulting redistribution arguably should not be made without some input by the affected groups in a more expanded decisionmaking process. The neutral prescriptions of welfare economics are limited, *see, e.g.*, W. BAUMOL, ECONOMIC THEORY AND OPERATIONS ANALYSIS 375-85 (2d ed. 1965) (a short survey and critique of this area), and even then, they are not usually followed. *See, e.g.*, Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967). Thus, a political choice among the competing values of varying interest groups remains inevitable. For a more fundamental criticism of cost/benefit analysis as applied to complex social and economic problems see Tribe, *Policy Science: Analysis or Ideology?*, 2 PHILOS. & PUB. AFFAIRS 66 (1972), where the author concludes there is a need for greater emphasis on social processes for conflict resolution.

113. During the great depression and the resulting New Deal, the great expansion of the administrative process took place. It seems a defensible thesis that, at that time, there was a general social consensus on the purposes (economic recovery and growth) of the administrative process regardless of whether elaborated in the enabling statutes. Any policy or value conflicts were generally deemed to be subordinated to this overriding objective. Consequently, it is less surprising that no well-developed constitutional theory was developed to underlie the administrative process, and that pressures for shifts in the relationship between the administrative process and the three traditional branches of government are being felt in a period of much less social consensus with respect to competing and conflicting social values.

114. U.S. Const. art. III.

115. *See generally*, SIMON, *supra* note 78, at 172-97.

> [T]he administrator, serving a public agency in a democratic state, must give a proper weight to *all* community values that are relevant to his activity, and that are reasonably ascertainable in relation thereto, and cannot restrict himself to values that happen to be his particular responsibility. Only under these conditions can a criterion of efficiency be validly postulated as a determinant of action.

Id. at 186 (emphasis in original).